

Michigan State University College of Law Digital Commons at Michigan State University College of Law

Student Scholarship

1-1-2002

Town Hall Meeting 9:00 p.m., Bring Your Gun!: Protecting the Public Health and Safety and Not Writing an Ultra Vires Ordinance; How to Challenge Michigan's Shall Issue Gun Law and Win Using the Equal Protection Clause as Applied

F. Douglas Mileski

Michigan State University College of Law

Follow this and additional works at: <http://digitalcommons.law.msu.edu/king>

Recommended Citation

F. Douglas Mileski, *Town Hall Meeting 9:00 p.m., Bring Your Gun!: Protecting the Public Health and Safety and Not Writing an Ultra Vires Ordinance; How to Challenge Michigan's Shall Issue Gun Law and Win Using the Equal Protection Clause as Applied* (2002), Available at: <http://digitalcommons.law.msu.edu/king/27>

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Student Scholarship by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.

Final Paper
King Fellows Senior Seminar Thesis

Town Hall Meeting 9:00pm,
Bring Your Gun!

Protecting The Public Health And Safety And Not Writing An
Ultra Vires Ordinance; How To Challenge Michigan's Shall
Issue Gun Law And Win Using The Equal Protection Clause As
Applied.

By

F. Douglas Mileski
Student # A10848358

CONTENTS

I.	FOREWARD	1
II.	INTRODUCTION	3
III.	ANALYSIS OF THE BILL AND ITS HISTORY	7
IV.	FORUM SELECTION.....	8
V.	STATUTORY ANALYSIS AND PREEMPTION	11
VI.	MUNICIPAL AUTHORITY TO ENACT A PROHIBATORY ORDINANCE	19
VII.	CRITIQUING THE LAW UNDER THE EQUAL PROTECTION CLAUSE	23
A.	Traditional Equal Protection Analysis	
	26	
B.	Limitations On State Power To Preempt Local Authority	28
C.	Differential Treatment Violating The Equal Protection Clause	29
D.	As Applied Challenges Under The Equal Protection Clause Are Recognized By The Supreme Court	33
E.	No Rationale Basis For The Law As Applied	
	35	
VIII.	MODEL CITY ORDINANCE.....	38
IX.	CONCLUSION.....	40

I. FOREWORD

Imagine the following situation; an individual is upset, he has listened to the City Council debate whether it is in the cities interest to take his home, raze it (and his

entire neighborhood in the process), pay him, and give the land to a major automobile manufacturer at a fraction of its worth so that the manufacturer can make more cars cheaply, in Michigan. In this public debate tempers have flared and the discussion has become heated.

The individual, like many others attending this council meeting discussing eminent domain, is an upstanding member of society. He has no criminal record, he has always played by society's rules, and now "they" are taking his house. They are going to destroy his home, his neighborhood, and his community.

His emotions are running high; he's feeling angry and resentful. So angry he might be driven to do something he would have never contemplated before. He reaches into his pocket and fumbles around for something. A police officer standing nearby notices the glint of something shiny and metallic, and approaches. No sooner has the man put the cigarette to his lips and fumbled for his Zippo lighter than the officer tells him that if he lights it, he goes to jail.

Now imagine the same scenario but instead of a shiny Zippo lighter in the man's pocket, the officer notices the cold steel glint of a semi-automatic handgun strapped to the man's chest. This time, as tempers continue to flare, the officer can do nothing. He can only hope that this man doesn't cross the line, and let his emotions take him on a dangerous path. The officer must also contend with the fact that there could be many more like him. This crowd could be

filled with literally dozens of semi-automatic weapons, but this time, unlike the Zippo scenario, the officer can do nothing.

That's right, until the man actually brandishes the pistol, a point of no return in the above scenario, the officer can't stop the man from carrying the weapon. Neither can the city council prevent the crowd from bringing in their handguns. For those that remember the contentious debate over the Poletown neighborhood in Detroit¹, it is not

¹ The Poletown neighborhood battle is one of the most documented cases of a neighborhood fighting against the forces of commerce, and losing. In 1981 the City of Detroit, and the City of Hamtramck allied with General Motors for the purpose of building a new factory. The location chosen was a traditionally ethnic immigrant community, in the heart of Detroit along the Hamtramck border, known as Poletown. The factory was to be a state of the art facility designed to revitalize Detroit. The main problem with the location was that 4,200 people lived there, and there were 1,300 homes that had to be destroyed, as well as 140 businesses, 6 churches, and a hospital. The homes were purchased for between six and thirteen thousand dollars with an additional fifteen thousand dollars made available to purchase a new home and three thousand five hundred dollars being offered if the residents moved by a certain date. Unfortunately, the money was insufficient for nearly forty percent of the people to buy a new home and many people did not want to move. The battle against a municipal taking was waged in court first and later in the form of sit-in demonstrations. See, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich., 1981). The crux of the neighborhood argument against the taking of people's property was that the taking was for a private, not a public purpose. Unfortunately for the neighborhood association, the Michigan Supreme Court held that the economic benefits of a new factory constituted a public purpose sufficient to validate the exercise of the power of eminent domain. Poletown Neighborhood Council, 304 N.W.2d at 459. Ralph Nader was one of the principal spokesmen for the neighborhood association. The collapse of the neighborhoods' survival campaign culminated with the Detroit Police forcibly removing dozens of worshippers from the Immaculate Conception Catholic Church, during regular Sunday

too hard to imagine the story described above, and unfortunately, as of July of 2001, a city in Michigan, under almost every circumstance, is prohibited from stopping a concealed weapons permit holder from going just about anywhere with that handgun.

II. INTRODUCTION

Michigan law provides that a concealed weapon permit must be issued, upon request, to any applicant that meets the statutory guidelines.² This law was enacted during the 2000 legislative session, and became effective in July of 2001. The law is known as a "shall issue" law, because so long as the statutory guidelines are met, the applicant must be given a permit, even if there are other public policy concerns that might counsel against giving out such a permit; or at the very least, concerns justifying more precise regulation of where a permit-holder may take his weapon. These policy concerns may be as mundane as the local desire of a particular municipality to minimize the number of concealed handguns in a crowded public hearing room. And the increased regulation on where one may and may not carry may range from the unique circumstances of a particularly contentious issue being debated to the no

mass, and arresting several of them. The factory was ultimately built but the neighborhood was destroyed. See also, Nolan, Jenny, Autoplant v. neighborhood: The Poletown battle, Detroit News online, <http://detnews.com/history/poletown/poletown.htm>

² Mich. Comp. Laws Ann. § 28.421 et seq. (2001).

longer remote possibility of a terrorist threat on a building or a particular occupant.

Prior to the shall issue law being enacted, Michigan adopted a law prohibiting municipalities from adopting any ordinance pertaining to or regulating nearly every aspect of firearm ownership.³ This first law is effectively a no-interference law because it prohibits municipalities from imposing restrictions on firearms⁴. These two laws, when read together, create a broad prohibition on municipalities that prevents them from protecting municipal property and employees from the potentially devastating effects of someone wielding a firearm.

Michigan law also requires that municipalities protect the public health.⁵ At the same time, by enacting the shall-issue statute described above, the legislature has taken away the power of municipal officials to act in their own best interests. The state legislature has, by statute, seemingly taken away their power to regulate this area of the public health. This paper asserts that it is unclear whether an actual conflict exists between the duties and responsibilities of municipal officials, should they find a restriction on weapons necessary, and the law as enacted by the legislature, but that such a conflict is likely.

There are two significant issues addressed in this paper; first, whether municipal ordinances that restrict the

³ Mich. Comp. Laws Ann. § 123.1101 et seq (2001).

⁴ Mich. Comp. Laws Ann. § 123.1101 et seq.

possession of weapons in public places are pre-empted by the state shall-issue law, and second, if so, whether the state's pre-emption of municipal authority to create such ordinances violates the Equal Protection Clause of the U.S. Constitution because it bears no rational relationship to a legitimate state purpose. This paper asserts that there may be an actual conflict, but that this is far from certain, and in any event municipalities still have the power to regulate weapons on municipal premises.

Even if a conflict exists, it is the duty of the legislature to pass laws that survive an equal protection challenge. In this instance, it appears that there is no rational basis for the state to completely prohibit any law affecting weapons, when such a law may have completely local reason for being. If this is the case, and if a municipality can successfully assert standing, then how can it be that the legislature should find it necessary to prohibit firearms in the senate gallery, on school property not occupied by students, or in a courthouse, yet a municipality like Detroit, should have no similar power?

It is the position of this paper that either the municipality proper, or its officials in their individual capacity have standing to bring an equal protection claim, and that under such a claim, prohibiting municipal officials from restricting firearms on municipal property serves no legitimate state purpose, and is not rationally related to

⁵ Mich. Comp. Laws Ann. § 117.4 et seq (2001).

any legitimate state interest, hypothetical or otherwise. Finally, as applied to the municipal property of home rule cities, the equal protection clause does not tolerate the distinctions made in the state law.

Despite what the laws purport to say, it is well recognized that Home Rule Cities, may still pass ordinances affecting firearms on municipal property and in the municipality in general. While a literal reading of the law would seem to evidence an intent by the legislature to foreclose any municipal authority regarding restricting weapons, this is not really true. In fact, there are numerous instances where a city is permitted to restrict firearms⁶. This paper will demonstrate that in addition to the right of municipalities to restrict the use of firearms, as in ordinances prohibiting discharge within city limits, cities may also restrict the possession of such arms, when such possession runs contrary to municipal duties as a home rule city.

This paper provides a model ordinance that may withstand constitutional scrutiny and might be effectively used to prohibit firearms from municipal premises. This ordinance asserts the powers of a Home Rule City, asserts the necessity of the ordinance and provides the legal framework for its existence.

⁶ For example, Mich. Comp. Laws Ann. § 123.1104 allows cities to regulate the discharge of firearms within city limits.

This paper concludes with the assertion that weapons have no place on municipal premises, that given the realities of the world today, such presence is a real and present danger to the effective institution of governmental business, and that such a prohibition burdens no cognizable constitutional or statutory right.

III. ANALYSIS OF THE BILL AND ITS HISTORY

The Michigan legislature passed the so-called shall issue law in 2000.⁷ In the bill summaries prepared for both the House and Senate there is no record of any consideration being given to whether local units of government have control over rules regulating possession on municipal property.

The bill was passed by a lame-duck legislature and specific attention was paid to making a law not susceptible to referendum.⁸ The bill was challenged by petition but was never subjected to the peoples right of referendum because the Michigan Supreme Court in its M.U.C.C.⁹ decision rejected the claim that the appropriations measure included in the bill was placed there solely to defeat the right of

⁷ Public Act No. 381 of 2000, (House Bill 4530), enacted as Mich. Comp. Laws Ann. 28.425 et seq. (2001).

⁸ Michigan United Conservation Clubs v. Secretary of State, 630 N.W.2d 297, 318 (Mich. 2000, Cavanaugh, J., dissenting) (discussing that an appropriations bill is immune from referendum under the Michigan Constitution) .

⁹ Michigan United Conservation Clubs, 630 N.W.2d 297.

referendum. The dissent in M.U.C.C.¹⁰ spent considerable time explaining the behavior of the legislature in rushing to pass the bill, and seeking to avoid a public vote by attaching an appropriation measure to the bill.¹¹ In support of this proposition several state senators claimed that the appropriations measures contained in the bill were put there for no other reason than to avoid a vote by the electorate.¹² In M.U.C.C. petitioners were unsuccessful in their bid to bring the shall-issue law to a vote in a statewide referendum. It is with this history in mind that the law must be analyzed.

IV. FORUM SELECTION

In determining the appropriate forum for litigating the constitutionality of the states' shall issue law, and its no interference law regarding municipal ordinances dealing with firearms, it is important to determine the forum where such litigation may arise. It is unlikely that the state of Michigan would bring a claim directly against the municipality¹³. It is much more likely that the law will be

¹⁰ Michigan United Conservation Clubs, 630 N.W.2d at 318 (Mich. 2000, Cavanaugh, J. dissenting).

¹¹ Michigan United Conservation Clubs, 630 N.W.2d at 318 (Mich. 2000, Cavanaugh, J., dissenting).

¹² Michigan United Conservation Clubs, 630 N.W.2d at 319 FN 3 (Mich. 2000, Cavanaugh, J., dissenting) (Senators Byrum and Gast indicated that the appropriation was made "to make [the bill] bulletproof and ballot-proof).

¹³ More typically Attorney's General in Michigan seem to prefer to allow private citizens to directly challenge ordinances they believe to be overly restrictive and then join such an action when the ordinance at issue concerns an

challenged by an individual or group upset with a perceived infringement on their right to keep and bear arms. If a claim is brought under these circumstances, it will necessarily be adjudicated in state court. It is the position of this paper that litigating this issue in state court markedly reduces the likelihood of success for the municipality.

The Michigan Supreme Court has demonstrated a substantial degree of hostility toward municipal authority in the area of gun control legislation, as evidenced by the M.U.C.C.¹⁴ decision. Due to the tone and tenor of the M.U.C.C. ruling, any challenge made on Equal Protection grounds ought to be made in federal court. First, the federal court has jurisdiction because the alleged violation arises under the equal protection clause and is therefore a federal question.¹⁵ Furthermore, in federal question jurisdiction, it is federal, not state substantive law that applies.¹⁶ While a federal court may be sympathetic to a state court position there is no mandate that the federal court bind itself to what it perceives the state court would rule. This being the case, the municipality would at least be in a forum without a history of ruling the other sides' way.

issue affecting important state-wide interests. See, Balogh v. City of Flatrock, 394 N.W.2d 1 (Mich. Ct. App., 1985).

¹⁴ Michigan United Conservation Clubs, 630 N.W.2d 297.

¹⁵ Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

¹⁶ Erie Railroad, 304 U.S. 64.

The key issue in getting this case into a federal court is a matter of litigation strategy. While a municipality could wait for a plaintiff to bring suit; that would result in the case going to state court regardless of the Equal Protection defense being offered in this paper¹⁷. Instead, a municipality ought to use the Federal Declaratory Judgment Act to bring suit directly in federal court¹⁸. The question of standing is obviously more delicate, and will be addressed in greater detail later in this paper, but it appears that even if the municipality itself would have difficulty bringing an action on its own behalf, there is no similar difficulty in the case of municipal workers bringing the challenge as the potentially injured parties.

It is possible that the federal court may elect to decline jurisdiction under a Pullman¹⁹ abstention, because the court might determine that the issue of whether there is preemption in the first place is a state issue that substantially predominates the claim, and that the state

¹⁷ See, 28 U.S.C. 1441(b). The so-called "well pleaded complaint rule" provides that the federal claim must be an element of the **plaintiff's** cause of action, and is designed to prevent litigants from using a defensive argument to gain access to a federal court, and in the present matter would prevent the case from being removed to federal court by the municipal defendants. For a discussion of this rule see, Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981).

¹⁸ 28 U.S.C. § 2201. While the Federal Declaratory Judgment Act does not confer jurisdiction it does create an avenue to pursue a cause of action once independent grounds have been found; in this case, the Equal Protection clause. See, Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

issue created by the law is sufficiently unclear so as to justify abstaining and allowing the state to work out the problem. Such a determination by the federal court would not be fatal to the success of the argument because plaintiffs may make use of an England²⁰ reservation to preserve the underlying claim in federal court. If it appears that the federal court is leaning toward abstaining it is important that the municipality appeal to the court to exercise supplemental jurisdiction²¹ which allows a federal court to hear a state claim whenever there is a claim "arising under [federal law], and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'." ²²

V. STATUTORY ANALYSIS AND PREEMPTION

Regardless of the forum selected by a municipality (or foisted upon it by a zealous plaintiff), the first issue that must be addressed once litigation begins, is

¹⁹ Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).

²⁰ England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) (establishing that a litigant may reserve his right to make a federal claim by first allowing the claim to be litigated in state court, and if the issue involving the federal claim is, in fact, not resolved at the state court level, the claim is preserved in federal court; but disallowing the use of abstention solely as a means of avoiding the case on the part of the bench).

²¹ 28 U.S.C. § 1367.

²² United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

demonstrating that the municipality had the authority to pass the ordinance in the first place.

The Second Amendment to the United States Constitution provides that "[a] well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."²³ In Michigan, the state Constitution provides even broader rights to carry firearms than the U.S. Constitution by providing that "[e]very person has a right to keep and bear arms for the defense of himself and the state."²⁴ The Michigan concealed weapons law is specific that;

[t]he commissioner or chief of police of a city, township, or village police department that issues licenses to purchase, carry, or transport pistols, or his or her duly authorized deputy, or the sheriff or his duly authorized deputy, in the parts of a county not included within a city, township or village having an organized police department, in discharging the duty to issue licenses **shall with due speed and diligence issue licenses to purchase, carry, or transport pistols** to qualified applicants residing within the city, village, township, or county, as applicable...²⁵

This law was enacted against the backdrop of a pre-existing law prohibiting a municipality from enacting or enforcing "any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation or possession of pistols or other firearms."²⁶ This underlying law raises the initial obstacle to the validity of a municipal ordinance, field

²³ U.S. Const amend II.

²⁴ Mich. Const. (1963), Art. I, Sec. 6.

²⁵ Mich. Comp. Laws Ann. § 28.422(3) (2001) (emphasis added).

preemption. Clearly the legislature had an eye on preemption, the sole question remaining is, were they successful?

Clearly, the language of Mich. Comp. Laws Ann. § 123.1102 is difficult to overcome with a purely statutory attack. However, it is arguable that none of the prohibitions imposed by § 123.1102 apply to a law restricting where one may voluntarily take ones firearm. Obviously, prohibiting firearms on municipal property does not pertain to or regulate the ownership, registration, purchase, sale, or transfer of pistols or other firearms. This leaves open the question of whether a prohibition in or on municipal property pertains to or regulates transportation or possession of such weapons. Of these two, transportation is probably the easier to dispense with. Transportation, in the context of this statute should arguably be read in a manner consistent with federal laws relating to firearms²⁶. In a context like that of § 123.1102, the language is designed to refer to commerce related restrictions and means the moving of such firearms from one location to another. If interpreted in this way, the ordinance proposed in this paper would not be implicated; there is no attempt to restrict weapons by impeding the free flow of trade, nor even to hinder the

²⁶ Mich. Comp. Laws Ann. § 123.1102 (2001).

²⁷ Compare with, 18 U.S.C.A. 922 et seq.

movements of individuals owning firearms from one location to another.

While arguing that an ordinance prohibiting possession of a weapon on municipal property does not regulate or pertain to the possession of a firearm would appear to be more difficult than threading a needle without any thumbs, this is not really the case. Possession in this case is not a defined term so it is appropriate to look to the ordinary meaning of the word in evaluating its meaning in the present circumstance²⁸. When determining the ordinary meaning of a word it is acceptable to use a dictionary²⁹. According to a standard desk dictionary, possession means "the act or fact of possessing" and possess means "[t]o have as property; [to] own."³⁰ It is manifestly apparent that the proposed ordinance in this paper does not impinge on anyone's right of ownership. The simpler, more direct and therefore more reasonable interpretation of the intent of the state law is that municipalities are not empowered to restrict a persons right to have and own a firearm³¹. The proposed ordinance would not do this, and would therefore, arguably, not conflict with the state law. This ordinance would limit

²⁸ People v. Aquwa, 626 N.W.2d 176, 179 (Mich. Ct. App., 2001).

²⁹ People v. Morey, 603 N.W.2d 250, 253 (Mich., 1999).

³⁰ Landau, Sidney I., Editor in Chief, Funk and Wagnalls Standard Desk Dictionary, Volume 2, 514-515, (Rand McNally and Co., 1979).

³¹ Morey, 603 N.W.2d at 253 (explaining that when a dictionary definition is used the plain, ordinary definition of a word is to be used when that meaning is relevant to interpreting the statute).

where one can and cannot go with the firearm he possesses, this is a subtle, yet potentially effective distinction that ought to be pursued concurrently with the claims being addressed in this paper.

The Michigan Court of Appeals recently articulated the standard for determining whether a state statute has preempted a local ordinance by holding that a municipal ordinance is preempted by state law if the statute completely occupies the field that the ordinance occupies, or if the ordinance conflicts with a state statute directly.³²

The procedure for determining preemption was described in more exhaustive detail the Michigan Supreme Court's Rental Property Owners³³ decision. In that case, the Michigan Supreme Court quoted People v. Llewelyn³⁴ as the standard followed in Michigan for over 25 years. The Llewelyn factors are; first, whether the state statute completely occupies the field of regulation regarding the subject addressed in both the statute and the ordinance; second, whether state law expressly provides that the state's authority to regulate in a specified area of law is exclusive; third, whether the nature of the regulated subject matter demands exclusive state regulation because it

³² Muskegon Area Rental Association v. City of Muskegon, 244 Mich. App. 45, 50-52 (2001) (citing Rental Property Owners Association of Kent County v. City of Grand Rapids, 455 Mich. 246 (1997)).

³³ Rental Property Owners Association of Kent County, 455 Mich. 246.

is necessary to achieve the uniformity intended by the state in enacting the statute and; fourth, whether the preemption of a field of regulation can be implied from a close examination of the legislative history.³⁵

Applying the standard laid out by the Michigan Supreme Court to the factual circumstances at issue regarding the shall-issue law it is apparent that it would be difficult for a municipality to defeat a preemption argument. Although neither the shall-issue law, nor its preexisting counter-part³⁶ expressly provide that the authority to regulate firearms is exclusively a state endeavor, they do evidence this intent and seem to completely occupy the field. Although it is the pre-existing law that is the heart of the issue of preemption, it is the controversy about the necessity for municipalities to protect employees and the public interest, in light of the addition of many more people possessing concealed weapons permits, that gives rise to the overreaching of the state law. It is undisputed in this paper that without such broad allowances for those carrying concealed weapons, there would be no need to worry about where firearms can and cannot be prohibited. It is because of the tandem effect of these two laws that they are being examined together in this paper. As stated earlier, the restrictions on municipalities are that "a local unit

³⁴ People v. Llewelyn 401 Mich. 314 (1972).

³⁵ Llewelyn 401 Mich. at 323-324.

³⁶ Mich. Comp. Laws Ann. § 28.421 et seq and Mich. Comp. Laws Ann. § 123.1101 (2001).

of government shall not impose a special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation or possession of pistols or other firearms. " ³⁷

In fact, the legislative history of the shall-issue law clearly demonstrates that the legislature considered and defeated a proposal that would have exempted government buildings from the generalized right to carry a concealed weapon.³⁸ Despite this lack of an exemption, it appears that the rule of reason has prevailed, and government buildings are doing exactly what the defeated amendment would have done.³⁹

³⁷ Mich. Comp. Laws Ann. § 123.1102 (2001).

³⁸ Roll Call 283 of May 26, 1999).

³⁹ See, Authors notes from telephone calls made February 14, 2002, and email response from Office of the Secretary of the Senate. (According to numerous people in various state buildings, including the State Capitol, an individual will not be permitted to bring a weapon, concealed or otherwise, into any state building. When this author pressed for any statutory authority or rule-based authority for such a prohibition no one was able to provide one. According to the Michigan State Police, who control security at the State Capitol if one attempted to enter the capitol building with a firearm, the guards would prevent entry and worry about what law was violated later. Subsequent telephone calls to the Michigan Attorney General's office produced no better results. Attorneys within the Attorney General's Office were also unable to provide authority to bar admission into state buildings, but did confirm that such behavior would be prevented by state police, and supported by the Attorney General's Office.) Readers, please note that no individual was publicly willing to go on record confirming the existence of the policy followed by state police guards. However, the existence of this policy may be readily confirmed by going to, or calling any state government building controlled by, or operated on behalf of, the Michigan legislature.

An argument might be made that the defeat of the government building exemption did not evidence the intent to prevent municipalities from protecting their employees and citizens. The legislative history of the law shows that the defeat was primarily due to a desire to simplify the terms of the law.⁴⁰ It is unlikely that the intent of the legislature was to allow the House and Senate galleries to be filled with gun-toting taxpayers the next time a tax hike is contemplated; yet with the defeat of this exemption this is precisely the behavior that the legislature apparently had elected to allow. If not for the common sense approach being applied by the state police, who control entry into state buildings, this behavior would be allowed under the law. "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."⁴¹ It is the position of this paper that the

⁴⁰ House Legislative Analysis, Revised First Analysis (6-8-99), Second Analysis (1-4-01), Third Analysis as Enrolled (1-4-01) (discussing generally the reasons for avoiding additions to the law as being unnecessary to achieve the primary purposes of the law; which were uniformity in issuing permits and ease in receiving a permit for those authorized by law to do so).

⁴¹ Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) (a church in New York hired a minister in England and paid for his voyage to the United States so that he could minister to the congregation. Prior to the hiring of the minister, and the church agreeing to pay the ministers passage, a law was passed by the United States Congress, prohibiting persons from paying the fare for anyone hired abroad with the intention of importing that person for the purpose of performing labor in the United States. The church was charged with violating this law, and while the U.S. Supreme Court agreed that the church had violated the

shall-issue and concealed carry laws do not, in fact, mean what they say. "If a literal construction of the words of a statute be absurd, the [law] must be so construed as to avoid the absurdity." ⁴²

Additionally, although the state regulatory scheme is pervasive, this is a factor only, and is not a determinative part of the Rental Property Owners criteria.⁴³ However, of potentially persuasive value, it was noted during the debate on passing the shall-issue law that the nature of the regulated subject matter, concealed weapons, demands an exclusive state-wide system of regulation to serve the purported interests of the state in achieving uniformity in obtaining a permit and simplifying the application process.⁴⁴ In arguing against this language it should be noted that mere mentioning of the keywords used in examining a statute for the necessity of preemption is unlikely to be persuasive enough to convince a court to be bound by it. As the U.S. Supreme Court articulated in Romer v. Evans⁴⁵, "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation

letter of the law, it held that the spirit of the law was not violated because the law couldn't possibly have meant what it said as applied to the facts of this case).

⁴² Holy Trinity Church, 143 U.S. at 460.

⁴³ Rental Property Owners Association of Kent County, 455 Mich. 246.

⁴⁴ House Legislative Analysis, Revised First Analysis (6-8-99), Second Analysis (1-4-01), Third Analysis as Enrolled (1-4-01).

⁴⁵ Romer v. Evans, 517 U.S. 620, 632 (1996).

between the classification adopted and the object to be attained. "

VI. MUNICIPAL AUTHORITY TO ENACT A PROHIBITORY ORDINANCE

While it would be difficult to enact an ordinance that would survive a challenge under the laws addressed in this paper⁴⁶ there are numerous avenues available to different home rule cities to avoid application of the law.

There are potential city- and building-specific exemptions that may be utilized on a case by case basis for various local units of government to successfully prohibit handguns. For example, courts, as a separate unit of government, are granted wide latitude in decisions regarding court rules. The Michigan Supreme Court went so far as to permit the complete prohibition of firearms by every court in the state.⁴⁷ While this prohibition is designed to protect the courts, many municipalities have their courts in the same building as their other municipal offices, and could probably prohibit firearms under an umbrella type ban by the court located under the same roof.⁴⁸

Presumably, following the logic of the Michigan Supreme Court in its M.U.C.C.⁴⁹ ruling, as emphasized by its

⁴⁶ Mich. Comp. Laws Ann. § 123.1101 et seq. (2001).

⁴⁷ Michigan Supreme Court Administrative Order, 2001-1 (March 27, 2001).

⁴⁸ An example of the existence of municipal offices and courts in the same building may be found in The City of Kentwood, a suburb of Grand Rapids, Michigan.

⁴⁹ Michigan United Conservation Clubs, 630 N.W.2d at 318.

subsequent administrative order,⁵⁰ the various offices of the executive branch, as a distinct branch of government could proscribe firearms on their premises. Similarly, since the legislative branch is already doing this, despite declining to expressly add this authority into the statute, it would seem that municipalities could successfully argue that they too, as subdivisions of the legislative branch, can also proscribe firearms on municipal premises.

If, on the other hand, municipalities cannot protect themselves as subdivisions of the legislative branch, the arguments against the law may be expanded. Additional arguments should also include vagueness, over-inclusiveness, and under-inclusiveness.⁵¹ These arguments would become more persuasive under these circumstances because it would now be impossible for anyone to discern what core of conduct is constitutionally prohibited. The law would then be enforced in an arbitrary and capricious manner because some

⁵⁰ Michigan Supreme Court Administrative Order, 2001-1 (March 27, 2001).

⁵¹ The focus of this paper is not on challenges to the state law based upon these grounds, but that the opportunity for such a challenge may exist is noted here solely to provide insight into a possible alternate avenue for challenging the law. However, such a challenge may implicate a procedural due process right of the municipality in the "life" of its officials or in the municipalities right to control municipal property. For an in depth analysis of standing for a municipality to challenge the state on procedural due process grounds see, Lawrence, Michael A., Do "Creatures Of The State" Have Constitutional Rights?: Standing For Municipalities To Assert Procedural Due Process Claims Against The State. Villanova L. Rev. Vol. 47, No. 1, 93 (2002).

subdivisions would be protected and others would not without a rational and articulated reason for the distinction.⁵²

Under Michigan law, "each city may in its charter provide... (3) For the exercise of **all municipal powers in the management and control of municipal property** and in the administration of the municipal government, whether such powers be expressly enumerated or not[.]"⁵³ This language could reasonably be interpreted to mean that the legislature has granted all powers the legislature would have otherwise had regarding buildings and property owned by a Home Rule city, to that Home Rule city. In fact, in the remainder of the statute, the legislature made clear that other municipal powers relating to the interests of the city, good government, and inhabitants of the municipality may be restricted by the legislature.⁵⁴

It is a well-settled principle of jurisprudence that laws are to be interpreted so as to not render a part of them meaningless.⁵⁵ Applying this rule to Mich. Comp. Laws Ann. 117.4j leads to the conclusion that the legislature meant to abdicate authority it would have had in this area to municipalities. Furthermore, the broad prohibition laid

⁵² The Fifth Amendment governs vagueness arguments. See, U.S. Const. amend. 5. The touchstone rationale for invalidating a vague law is that it "may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), and other citations which have been omitted). For an in depth analysis of these challenges see, Grayned, 408 U.S. 104.

⁵³ Mich. Comp. Laws Ann. § 117.4j (emphasis added).

⁵⁴ Mich. Comp. Laws Ann. § 117.4j.

out in Mich. Comp. Laws Ann. § 123.1102⁵⁶ is narrowed by Mich. Comp. Laws Ann. § 123.1103⁵⁷ which provides that municipalities may regulate conduct that would be a criminal offense under other state law. With this exception it may be argued that other conduct on the part of a municipality would also be acceptable.

The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements.... The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of

⁵⁵ See, Marbury v. Madison, 5 U.S. 137 (1803).

⁵⁶ Mich. Comp. Laws Ann. § 123.1102 provides that:
[a] local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner, the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.

⁵⁷ Mich. Comp. Laws Ann. § 123.1103 provides that local units of government are not prohibited;

from doing either of the following:

- (a) Prohibiting or regulating conduct with a pistol or other firearm that is a criminal offense under state law.
- (b) Prohibiting or regulating the transportation, carrying, or possession of pistols and other firearms by employees of that local unit of government in the course of their employment with that local unit of government.

the statute and the ordinance because of which they cannot coexist and be effective.⁵⁸

Although this line of argument is persuasive in some contexts, it is not especially likely to be determinative under the facts outlined in this paper, so alternative arguments ought also be pursued. Because this argument is probably not sufficiently persuasive, the single greatest challenge is crafting an argument that will likely survive summary disposition. It is precisely this necessity that gives rise to the argument in this paper that the Equal Protection Clause of the U.S. Constitution is unconstitutionally impinged.

VII. CRITIQUING THE LAW UNDER THE EQUAL PROTECTION CLAUSE

After enacting an ordinance restricting concealed weapons in particular, and other weapons generally, from public buildings, litigation will likely follow; whether it is initiated by the municipality seeking a declaratory judgment, or by a citizen alleging his rights have been infringed by enforcement of the ordinance.⁵⁹ In either case, the municipality and the affected municipal employees must answer the most likely challenge, that state law has

⁵⁸ City of Detroit v. Qualls 454 N.W.2d 374, 385 FN 41 (Mich., 1990) (quoting 56 Am.Jur.2d, Municipal Corporations, § 374, pp. 408-409).

⁵⁹ It is possible that an individual could make a pre-enforcement, facial, challenge arguing that there is no set of circumstances under which the ordinance would be valid. For a discussion of the requirements for making a facial challenge see, City of Chicago v. Morales, 527 U.S. 41, 55 (1999).

preempted the ordinance. The municipality and its employees should assert that the law violates the Equal Protection clause of the Fourteenth Amendment to the United States Constitution⁶⁰ because it bears no rational relationship to a legitimate state interest. The Fourteenth Amendment provides in pertinent part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws⁶¹.

Although classical interpretation of municipal standing seems to prohibit a municipality from asserting an equal protection claim⁶², there is no similar prohibition on the ability of individual municipal authorities to assert an equal protection claim in their individual capacity.⁶³ There

⁶⁰ U.S. Const. Amend XIV.

⁶¹ U.S. Const. Amend XIV, Sec. 1.

⁶² I would like to provide special thanks to Michigan State University- Detroit College of Law Associate Dean and Professor of Law Michael A. Lawrence for providing me with a draft copy of his recently published paper Do "Creatures Of The State" Have Constitutional Rights?: Standing For Municipalities To Assert Procedural Due Process Claims Against The State. Villanova L. Rev. Vol. 47, No. 1, 93, 2002, (discussing the tangentially related concept of municipal standing to sue the state in certain instances).

⁶³ "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals[.]" Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (quoting Arizona Governing Comm. For Tax Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083 (1983)). Municipal employees are, in all likelihood, citizens of the state in which the city they work for is located. As such,

have been rare cases where municipalities have successfully argued for constitutional protection, but these are inapplicable to the present circumstances.⁶⁴

Instead, a much stronger argument can be made on behalf of the individuals affected by the states prohibition on weapons restrictions. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." ⁶⁵

An Equal Protection argument, whether used as a defense or in seeking a declaratory judgment, should be structured into a three-pronged analysis. The first issue is whether there are limitations to the states power to preempt. Using

it is well recognized that any citizen of a state may bring an action against that state for violations under the equal protection clause. Plyler v. Doe, 457 U.S. 202, 216 (1982). For a proposition similar to that of municipal employees having standing as residents of the municipality and citizens of the state; in the context of a Congressional district, rather than a municipal subdivision, see, Miller v. Johnson, 515 U.S. 900, 909 (1999) (recognizing that residents of a Congressional district have standing to bring a claim arising from actions of the state concerning that Congressional district).

⁶⁴ See, People ex rel. Park Commrs. v. Detroit, 28 Mich. 228 (1873) (discussing the absence of state authority to control the action of a municipal corporation where the common council has been authorized by the legislature to issue bonds and the common council refused, despite a site having been selected for the purchase of a park in accordance with the original plans of the municipality, because in matters of purely local concern, the state has no right to control local action).

the U.S. Supreme Courts Equal Protection analysis in Romer⁶⁶, it appears that there are limits, in that a state may not draw irrational conclusions, and base statutes upon irrational assumptions. Second, assuming there are limits to the states authority to pass laws preempting municipal protections of constitutional rights, the municipality and its employees must identify a group or groups of similarly situated individuals or governmental units that are receiving different protection under the law, and that the law, as applied, is violated because the law makes irrational distinctions between the identified classes. Finally, the municipality or its employees must demonstrate that there is no rational basis for this law in the identified context.

A. Traditional Equal Protection Analysis

The United States Supreme Court in Romer v. Evans⁶⁷ has laid out the standard for making an equal protection challenge to a state law. In an ordinary equal protection claim, where the alleged victim is not a member of a suspect or quasi-suspect class, the challenged law must withstand a rational relationship challenge.⁶⁸ "The general rule is that legislation is presumed to be valid and will be

⁶⁵ Sioux City Bridge Co., v. Dakota County, 260 U.S. 441, 445 (1923) (quoting Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918)).

⁶⁶ Romer, 517 U.S. at 620.

⁶⁷ Romer, 517 U.S. at 620.

⁶⁸ Romer, 517 U.S. at 632.

sustained if the classification drawn by the statute is rationally related to a legitimate state interest.⁶⁹ As noted earlier, "even in the ordinary equal protection case calling for the most deferential of standards, [the U.S. Supreme Court] insist[s] on knowing the relationship between the classification adopted and the object to obtained."⁷⁰ The challenged law must bear a rational relationship to a legitimate state interest, and this paper concedes that the alleged interest may even be hypothetical. However, even a hypothetical interest must be rational, and the interests of the state in this matter, are not.

The state has enumerated its interests in passing the shall-issue law as being designed to simplify the application process and to achieve greater uniformity in the ability of applicants to obtain a concealed weapons permit.⁷¹ The state has also asserted an interest in making it easier for law-abiding citizens to obtain a concealed weapons permit.⁷² While these interests are certainly cognizable state-interests, the question remains whether these interests would be impeded by a restriction on where such a concealed weapon could be carried, and if they are not, the law is not rational.

⁶⁹ City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

⁷⁰ Romer, 517 U.S. at 632.

⁷¹ House Legislative Analysis, Revised First Analysis (6-8-99), Second Analysis (7-26-99, Third Analysis as Enrolled (1-4-01).

⁷² Mich. Comp. Laws Ann. § 28.421a (2001).

Although it appears that the statute challenged by this paper might fail a traditional, facial challenge under the Equal Protection Clause, where the burden on those challenging the statute is to demonstrate that there is no set of circumstances where the law would be valid⁷³; that is not the type of challenge being proposed by this paper. Instead, this paper challenges the law, as applied; a much narrower and less widely accepted approach to Equal Protection claims. However, before moving to that portion of the analysis it is important to examine whether there are any limitations on state power to restrict municipal authority in the first place.

B. Limitations On State Power To Preempt Local Authority

The Michigan Supreme Court has recognized a distinction in municipal authority that is primarily "administrative", as opposed to "legislative."⁷⁴ In Kropf, the Michigan Supreme Court examined a zoning ordinance and the authority of the legislature to delegate authority to local units of government. Although this case is factually dissimilar, several propositions of law regarding the burdens that must be met in showing that a law is irrational apply to this paper. The specific analysis of interest to this paper is

⁷³ Baker v. City of Concord, 916 F.2d 744, 753 (1st Cir., 1990).

⁷⁴ Kropf v. City of Sterling Heights, 215 N.W.2d 179, 190 (Mich. 1974) (Levin, J., concurring).

that the legislature, when delegating authority to a local unit of government, is free to grant all administrative powers to that unit of government.⁷⁵ This is especially true when the administrative powers conferred are used to regulate a purely local concern, like the entrance into a local building.

Furthermore, the Michigan Supreme Court has explicitly pointed out that "Michigan is strongly committed to the concept of home rule, and constitutional and statutory provisions which grant power to municipalities are to be liberally construed."⁷⁶ Directing this principle toward the shall-issue law as it works in combination with the no-interference law as applied to home rule cities, establishes that there are likely to be limitations on the state's authority to preempt local rule. First, because there is at least limited historical support for such a restriction, as pointed out earlier in discussing People ex rel. Park Commrs.⁷⁷ And second, because the policy of home rule is firmly established in Michigan, to fail to recognize this principle would render the historical strong commitment meaningless.

⁷⁵ Kropf v. City of Sterling Heights, 215 N.W.2d at 190, FN2 (Levin, J., concurring) (citing the authority conferred by the Michigan Constitution in Article 7).

⁷⁶ Bivens v. Grand Rapids, 505 N.W. 2d 239, 243 (Mich. 1993) (holding that while a municipality may not pass an ordinance conflicting with a state statute or the Constitution, there are powers that are necessarily implied to exist, and a city may exercise those powers).

⁷⁷ See, People ex rel. Park Commrs. v. Detroit, 28 Mich. 228 (1873).

C. Differential Treatment Violating The Equal Protection Clause

It is hornbook law that the U.S. Constitution "neither knows nor tolerates classes among citizens."⁷⁸ How this works in the real world, where classes exist, and are recognized on a daily basis, is less clear. In this paper we must examine whether an interest of the state is promoted by prohibiting a weapon on municipal property. The two interests claimed by the law are an increase in uniformity in issuing permits, and a desire to make obtaining a concealed weapons permit easier. A law prohibiting an individual from voluntarily entering property with a concealed weapon does not burden either of these interests. The law prohibiting a municipal restriction is clearly not rationally related to achieving either of these interests.

For a local official to make a claim of an equal protection violation he must first assert a class to which his treatment has been differentiated. In the present matter, there are three identified groups to which the state has opted to treat differently. First, the state, by its post-enactment behavior, has opted to treat state controlled buildings differently than municipally controlled

⁷⁸ Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion).

buildings.⁷⁹ Second, subdivisions of the courts, by judicial interpretation of the law, are treated differently than subdivisions of the legislature.⁸⁰ Third, the venues the legislature has determined to be exempted are treated differently than municipal buildings without a clear rationale.⁸¹

⁷⁹ See, Authors notes, referenced at FN 24, supra.

⁸⁰ Michigan Supreme Court Administrative Order, 2001-1 (March 27, 2001) (allowing all lower courts in the state to craft court rules that prohibit weapons wherever the court sees fit).

⁸¹ Mich. Comp. Laws Ann. § 28.425o provides;

An individual licensed under this act to carry a concealed pistol, or who is exempt from licensure under section 12a(f), shall not carry a pistol on the premises of any of the following:

- (a) A school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property, if he or she is dropping the student off at the school or picking the child up from the school...
- (b) A public or private day care center, public or private child caring agency, or public or private child placing agency.
- (c) A sports arena or stadium.
- (d) A dining room, lounge, or bar area of a premises licensed under the Michigan liquor control code...
- (e) Any property owned or operated by a church, synagogue, mosque, temple or other place of worship, unless the presiding official or officials of the church, synagogue, mosque, temple or other place of worship permit the carrying of concealed pistol on that property or facility.
- (f) An entertainment facility that the individual knows or should know has a seating capacity of 2,500 or more individuals or that has a sign above each public entrance stating in letters not less than 1-inch high a seating capacity of 2,500 or more individuals.
- (g) A hospital.
- (h) A dormitory or classroom of a community college, college, or university.

Once differentially treated classes are identified, the municipality must demonstrate that the law is applied in a non-neutral fashion.⁸² In the present circumstances, although the state has enumerated certain interests, certain individuals are treated differently under the law without clear reasons for the boundaries. For example, school employees work in an environment where weapons have been prohibited by the statute.⁸³ Other branches of government receive different treatment than municipalities most notably, the judicial branch is permitted by Michigan Supreme Court Order, to prohibit weapons in any building where court employees regularly perform their duties.⁸⁴

Although a claim might be made under the difference in treatment between municipalities and courts, the stronger argument applies to school property like administrative buildings. It is conceivable that a legitimate state interest might be served in prohibiting weapons where juveniles, with juvenile judgment, are present. This interest is not protected on school property where students are not regularly present, like the Administrative Offices of Detroit Public Schools. It is this difference in protection that gives rise to the alleged Equal Protection claim addressed in this paper.

⁸² Romer, 517 U.S. at 623.

⁸³ Mich. Comp. Laws Ann. § 28.425o(a) (2001).

⁸⁴ Michigan Supreme Court Administrative Order, 2001-1 (March 27, 2001).

It is important to compare several of the articulated exemptions for private property to similar uses present in municipal property to establish that there is no rational basis for the distinctions. The prohibition on bringing a weapon to school or onto school property or to day care centers, child caring agencies, or child placing agencies seems particularly sound. However, the law should not stop there. There is no rational reason to draw a distinction between a community center, where youth recreation leagues regularly gather, and schools.

Sports arenas or stadiums as well as entertainment facilities with seating capacities of 2,500 or more are much like public parks and other large public facilities. In Grand Rapids, Michigan tens of thousands of people gather at Ah-Nab-A-Wen Park on the banks of the Grand River for public concerts and fireworks, yet the police have no authority to prohibit firearms at these events, although the same interests that would foster a prohibition in a stadium would apply equally to such a location. Even places of worship are given the discretion to decide for themselves whether or not to allow weapons. Clearly, at least some of the reasons for attending a church go beyond the spiritual and extend to the sense of community and fellowship one feels; these are similar functions to those of a municipality and represent at least some degree of related purpose. And hospitals, dormitories, and college classrooms ought to be compared to adult respite care facilities, and community enrichment

classes offered by numerous municipalities throughout the state. If the state were rational in its selection of these exemptions, that rationality would also extend so far as to apply to municipal property being used for similar purposes.

D. As Applied Challenges Under The Equal Protection Clause Are Recognized By The Supreme Court

Although under a traditional facial challenge it is necessary to demonstrate no set of circumstances where a law would be valid, the same is not true under an as-applied challenge. The traditional view would hold that the courts should not redraft overbroad statutes through the cumbersome process of as-applied constitutional rulings simply to make a law constitutional under every set of circumstances.⁸⁵ However, even Justice Marshall, who dissented to the principle of violating Equal Protection as applied, conceded that the approach might be defensible if the challenged portion of the law could be easily severed.⁸⁶

The touchstone principal of this prong of the equal protection claim asserted in this paper is that there is a recognized concept of equal protection as applied, and that it is this principle that is violated by the shall-issue law. In Britell v. United States⁸⁷ a federal district court

⁸⁵ Cleburne Living Center, 473 U.S. at 476 (Marshall, J., dissenting).

⁸⁶ Cleburne Living Center, 473 U.S. at 476 (Marshall, J., dissenting).

⁸⁷ Britell v. United States, 150 F.Supp. 2d 211 (D. Mass., 2001).

in Massachusetts analyzed the concept of equal protection as applied and concluded that such a claim could be maintained and was long recognized in federal jurisprudence.

Equal Protection As-Applied involves the recognition of a distinction between a facial challenge to a law, where no set of circumstances exist under which the law would be valid, and a less rigorous challenge where although the law might have constitutional applications, none of those applications apply to the circumstances giving rise to the action.⁸⁸ Although not as often invoked, or as strongly supported, the concept of equal protection as applied has Supreme Court support, as well as the support of numerous appellate and district courts throughout the United States. In addition to Cleburne Living Centers and Romer the Supreme Court recognized as-applied challenges involving state laws treating real property owners and non-real property owners differently⁸⁹, and in the context of the right of homosexuals to serve in the Navy.⁹⁰ The Britell court, in analyzing the concept of equal protection as applied, concluded that such a claim is legally cognizable.⁹¹ If the same rationale is used in the challenging of the shall issue law, it should lead to a recognition that this case would also meet the as applied burden, because that burden, at its simplest is only to establish that the law does not serve its otherwise

⁸⁸ Cleburne Living Center, 473 U.S. at 443-446.

⁸⁹ Quinn v. Millsap, 491 U.S. 95, 103 n. 8 (1989).

⁹⁰ United States v. Salerno, 481 U.S. 739, 745 (1987).

⁹¹ Britell, 150 F.Supp. 2d 221-222.

rational ends when applied to the particular circumstances giving rise to the cause of action.⁹²

E. No Rational Basis For The Law As Applied

Having established that there is support for the principle of violating equal protection as applied, the final question is whether the law might serve a hypothetical or unarticulated interest that is furthered when the law is applied against municipal buildings. If there is not, then an ordinance contradicting the statute would be successful because the law would fail an equal protection challenge as applied by a municipal employee.

In Britell⁹³, a woman brought a claim against the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). The issue revolved around the rationality of a CHAMPUS prohibition on paying for abortions based upon fetal abnormalities. Specifically, the articulated interest furthered by the CHAMPUS prohibition was to promote life. In Britell, that interest, as applied to the plaintiff, was not furthered because she was carrying an anencephalic fetus that had no chance of survival after birth. The judge ruled that the articulated state interest was not rational on its face, as applied to Britell, and allowed the case to proceed with proofs. Unfortunately, the hearing in Britell was the last judicial proceeding on the

⁹² Britell, 150 F.Supp. 2d 223-224.

⁹³ Britell, 150 F.Supp. 2d 211.

matter, and a final ruling on the merits has not been produced. Notwithstanding this fact, the principles enunciated in Britell, are equally applicable to the present matter.

First, the treatment of state controlled buildings should be substantially similar to municipally controlled buildings because their missions are substantially similar and the threat to one is likely to be similar to a threat to another. To take the most extreme example, city hall in New York City, is at least as good of a target for a gun-toting terrorist as the state capital in Albany, New York. While New York is not Michigan, and New York City is not Detroit, the principle is clear. Also, it is unlikely that protecting one and not the other further the aforementioned articulated state interests.

Second, subdivisions of the courts, by judicial interpretation of the law, are treated differently than subdivisions of the legislature without a basis for doing so that would further a state interest. The courts have clearly recognized that the law, as written could not have been meant to be applied as broadly as written, and this principle is equally extensible to municipal buildings.

Finally, the venues that the legislature has determined to be exempted are treated differently than municipal buildings without a clear rationale. In fact, if a rationale could be articulated by the state, it is likely that it would be a substantially similar rationale to the

rationale espoused by municipalities and their employees. For example, if there is a hypothetical rationale like protecting people from accidental discharge in a crowded stadium, this rationale would apply just as well to a crowded assembly room at city hall. Even if the state were to argue that the goal of the statute is furthered by allowing weapons in as many places as possible because it is an expressly enunciated right in both the state and federal constitutions, this is to no avail because clearly, municipal buildings fall outside of the "as many places as possible" goal.

The ultimate position of any court evaluating this law under the scenarios described above should be to accept Justice Marshall's recognition that there may be times when an as applied challenge should be recognized if the law can be easily fixed. In this case, rather than excising the unconstitutional portion, the better approach would be to read in the necessary addition; no weapons in municipal buildings. Or even narrower, that home rule cities may prohibit weapons on municipal property. Either approach leaves the law substantially intact while protecting the rights and safety of municipal officials and employees.

VIII. MODEL CITY ORDINANCE⁹⁴

There are several factors to be considered in passing a municipal ordinance. The following is a suggested ordinance only, and should be modified with references to the appropriate authority of the city using it.

**AN ORDINANCE REGULATING THE POSSESSION OF A WEAPON
IN ANY BUILDING OR FACILITY IN THE CITY OF _____,
PROVIDING FOR THE ENFORCEMENT OF THIS ORDINANCE
EFFECTIVE _____ 2002.**

Whereas, the possession of firearms, and other dangerous weapons poses a threat to the health and safety of the general public, the employees, and the officials of the City of _____,

Whereas, the City of _____ is a Home Rule City authorized and empowered to enact laws pertaining to purely local concerns,

Whereas, the State has no interest which outweighs the sanctity and security of human life,

The City of _____ enacts:

Section 1. Purpose. The City Council of the City of _____, pursuant to its constitutional and statutory authority to enact ordinances pertaining to City affairs, and pursuant to its authority to care for and manage the buildings and property of the City, adopts this Ordinance to regulate the possession of weapons in any City building or facility owned leased or operated by or on behalf of the City of _____. The purpose of this Ordinance is to protect the safety of members of the general public, the employees and the officials of the City of _____, and to ensure the effective operation of municipal government.

⁹⁴ Special thanks to Greg Rappley, corporate counsel for Ottawa County, Michigan who graciously and generously provided me with a draft copy of an ordinance potentially to be considered by the Ottawa County Commission. It was that draft copy that I used as a model for the above Ordinance (please note, the above ordinance has been extensively modified to reflect provisions I believe are necessary).

Section 2.Definitions. When used in this Ordinance, the following words and phrases shall have the meanings ascribed to each respectively.

(a) "City building or facility" shall mean any building, facility, structure, or accompanying parking lot owned leased, or operated by or on behalf of the City of_____.

(b) "Person" shall mean any natural person, but not including any local, state, or federal law enforcement officer who is regularly authorized to carry weapons, including firearms, in the performance of his or her duties.

(c) "Weapon" shall mean a knife, dagger, dirk, stiletto or other cutting device; a shotgun, rifle, handgun, or other firearm; a cs device as defined by law; a club, baton or other device that may be reasonably construed as an instrument intended to be used to bludgeon another person; or any explosive device or materials.

Section 3.Prohibition and Regulations. No person shall possess any weapon in or on any city building or facility.

Section 4.Posting. The City shall conspicuously post, at every intended point of entrance, a sign advising invitees and guests of the prohibition on possessing weapons while on City premises. Each notice shall reference this Ordinance, the above definition of weapon, and the maximum penalty imposed under this Ordinance.

Section 5.Penalties. A person who violates this Ordinance shall be guilty of a misdemeanor, and shall pay a fine not to exceed \$500.00, or be imprisoned for a period not to exceed ninety days, or both.

Section 6.Conflict With Criminal Laws. Nothing in this Section shall be construed to conflict with, contravene, enlarge, or reduce any criminal liability or responsibility, including other fines or penalties imposed by a judge for any criminal offense under Michigan law.

Section 7.Severability. The phrases, sentences, sections and provisions of this Section are severable, and the finding that any portion hereof is unconstitutional or otherwise unenforceable shall not detract from or affect the enforceability of the remainder of this Ordinance.

Section 8. Repeal of Conflicting Ordinances. All other Ordinances, parts of Ordinances, or amendments thereto, any of which are in conflict with the provisions of this Ordinance, are hereby repealed in their entirety to the extent of such conflict.

This ordinance should also be made to include notification of approval, an effective date, and publication provisions.

IX. CONCLUSION

In sum, it appears that there is a viable means of challenging the validity of the new concealed weapons law as it may be applied to municipal authority to restrict such weapons on municipal property. There is no real or hypothetical state interest furthered by such a prohibition.

I suggest, that if a challenge to the law is made on these grounds, the best forum to adjudicate such a constitutional claim would be in the Federal courts. The initial challenge to the law was defeated in Michigan's Supreme Court, and the majority of the justices have demonstrated at least some hostility toward restrictions they perceive to impinge upon the right to keep and bear arms.

The shall-issue law, when combined with the broad prohibitions on municipal authority to restrict firearms on municipal premises furthers no legitimate state interest and is irrational as applied to municipalities. Perhaps the best reading of the law is "read in" the clause

"municipalities shall not regulate possession of firearms outside of municipal property." The law should be interpreted broadly and the public health welfare and safety ought to be protected, and this reading will accomplish that end.